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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 648

JAMES AVERY, PETITIONER,

vs.

THE STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED JULY 28, 1952
CERTIORARI GRANTED MARCH 9, 1953

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN SUPERIOR COURT OF WALKER COUNTY, STATE OF GEORGIA**

INDICTMENT—February 21, 1951

GEORGIA,
Walker County:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, Selected, Chosen and Sworn for the County of Walker, to wit:

1. W. L. Kling, Foreman.
2. A. S. Brown.
3. R. R. Clarkson.
4. James Agnew.
5. E. E. Russell.
6. Judson Marsh.
7. Gordon Ragland.
8. J. O. Leigh.
9. "R. W. Jannings".
10. W. L. Baker.
11. Frank Shaw
12. C. R. McGaha.
13. W. B. Leighridge.
14. Charles R. Thurman.
15. H. B. Lowe.
16. D. C. Headrick.
17. C. L. Crowder.
18. W. B. McGill.
19. Bence C. Smith.
20. Kirby Smith, Sr.
21. D. B. Blaylock.
22. "H. C. Ciuett".
23. G. B. Smith.

SPECIAL PRESENTMENT—February 21, 1951

In the name and behalf of the citizens of Georgia, charge and accuse James Avery of the County and State aforesaid with the offense of FELONY, for that the said James Avery did on the 29th day of October in the year of our Lord Nineteen Hundred and Fifty in the county aforesaid, unlawfully and with force and arms, make an assault upon the person of Mrs. M. L. Hollingsworth, and did strike, beat and wound her, and did have carnal knowledge of and sexual intercourse with said Mrs. W. L. Hollingsworth, a female, forcibly and against her will, contrary to the laws of said State, the good order, peace and dignity thereof.

John W. Davis, Solicitor General. Mrs. M. L. Hollingsworth, Prosecutor.

[fol. 2] SUPERIOR COURT, FEBRUARY TERM, 1951

THE STATE

VS.

—— ——

—— Court, —— Term, 194—. Plea, Not Guilty —— Guilty.

SENTENCE

Whereupon, it is ordered and adjudged by the Court that the Defendant pay a fine of — Dollars and all cost, and that he remain in custody until fine is paid, and in default of payment of said fine within — days from date, that said Defendant be confined at work in the Chain gang of said County on the Public Works, or elsewhere, as the law directs, for and during the full term of — months, to be computed from the time of his reception at said — with the privilege to pay said fine and cost and be discharged at any time after entering any public works.

E. J. Clower, Solicitor General.

This — day of — — 194—.

——, Judge.

[fol. 3] Sub. 2-24-51. Witnesses: Mrs. M. L. Hollingsworth, Stanley Hollingsworth, Joe Adams.

[Endorsed:] No. 4169. Superior Court, Walker County, February Term, 1951. The State vs. James Avery. Felony. (Rape.) Special Presentment. True Bill. W. L. Kling, Foreman. 21 Day of Feb. 1951. ——, Prosecutor. John W. Davis, Solicitor General.

[fol. 4] IN SUPERIOR COURT OF WALKER COUNTY

WAIVER OF ARRAIGNMENT AND PLEA OF NOT GUILTY

The Defendant, James Avery, waives formal arraignment, copy Bill of Indictment, list of witnesses before the Grand Jury, and agrees to strike from a panel of 48 Jurors and pleads not guilty.

Frank M. Gleason, G. P. Shaw, Defendant's Attorney. John W. Davis, Solicitor General.

[fol. 5] IN SUPERIOR COURT OF FULTON COUNTY

CHALLENGE TO ARRAY AND ORDER OVERRULING—Filed September 17, 1951

Now comes the defendant in the above stated cause, and files this, his challenge to the array of traverse jurors, before said panel is placed upon him, and for grounds of challenge to the array shows that the traverse jury put upon him is not, and was not, fairly and properly impaneled, and is an illegal jury and ought not to be put upon him, and as grounds of challenge alleges:

1

That said jurors so put upon him were taken from the jury list of Fulton County, Georgia, from the books of the tax receiver of Fulton County, Georgia, pursuant to the provisions of Georgia Code, section 59-106, which provides:

"Biennially, or, if the judge of the Superior Court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the Board of Jury Commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the entire number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, [fol. 6] such name shall be returned to the box and another drawn in its stead."

2

That the provisions of the above quoted statute are contrary to and in violation of the provisions of Art. VI, Sec.

XVI, Par. II of the Constitution of Georgia (Code, 2-1502) which provides:

"The General Assembly shall provide by law for the selection of the most experienced, intelligent, and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such regulations as the General Assembly may prescribe" for the following reasons:

(a) Said statute illegally restricts the selection of upright and intelligent men to property owners.

(b) The language of the above stated statute limits and restricts the operation of the above quoted provisions of the Georgia Constitution, in that it excludes from jury service upright and intelligent persons entitled to serve, under the provisions of the Constitution, whose names do not appear on the tax receiver's digest.

(c) Said statute illegally excludes from the jury commissioners' consideration the names of upright and intelligent men who are not property owners.

(d) Said statute illegally imposes a property ownership qualification as a condition precedent to jury service, when the Constitution of Georgia imposes no such qualification.

(e) Said statute illegally excludes and disqualifies from jury duty, poor and indigent citizens.

(f) Said statute illegally excludes experienced, intelligent and upright men who are property owners and make no return to the tax receiver, and those who from poverty make no return to the tax receiver.

(g) The statute illegally vests in the jury commissioners uncontrolled discretion and power to select jurors from a [fol. 7] special class, who happen to be property owners, to the exclusion of the non-property owner class, when the constitutional provision aforesaid vested in the General Assembly no such power or authority to enact such legislation.

(h) Said statute illegally places the power in the jury commissioners as administrative officers to exclude masses of the citizens from jury duty without defining the power, regulating the act, or in any way controlling the decision of said jury commissioners.

(i) Said statute is vague and indefinite and incapable of enforcement in that it sets up no guide to control the official acts of the jury commissioners, and provides for no hearing or appeal. Said statute does not define an "experienced," "upright," or "intelligent" man or set up any standard by which it could be determined that those selected from a property ownership class possessed any such qualification.

(j) Said statute provides no method or procedure by which defendant could determine whether said commissioners performed their duties in accordance with the Constitution, and selected "intelligent and upright" men in the first instance.

3

For the specific reasons alleged in paragraph 2 hereof, said statute (Code § 59-106) violates Art. I, Sec. I, Par. XXV of the Constitution of Georgia (Code § 2-125), which provides:

"All citizens of the United States, resident in this State, are hereby declared citizens of this State, and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship."

4

For the specific reasons alleged in paragraph 2 hereof, said statute violates Art. I, Sec. I, Par. III of the Constitution of the State of Georgia (Georgia Code 2-103), which provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

[fol. 8]

5

For the specific reasons alleged in paragraph 2 hereof, said statute (59-106) violates section 1 of the Fourteenth Amendment of the Constitution of the United States (Georgia Code, § 1-815), which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws," and denies the defendant the equal protection of the laws.

6

The General Assembly of Georgia, in an attempt to carry out the provisions of Art. VI, Sec. XVI, Par. II of the Constitution above quoted (Georgia Code, § 2-5102), enacted a law, embodied in Georgia Code, § 59-101, providing:

"There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the Superior Court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor; provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

Under the foregoing statute the Judge of the Superior Court is required to appoint six "discreet" persons to such board.

Defendant alleges that while said law (section 59-101) is a constitutional law, it has been applied in an unconstitu- [fol. 9] tional manner by State action as to him because:

(a) Defendant is a Negro.

(b) Defendant stands charged with the rape of a white woman.

(c) Said statute makes no provision for the appointment of a person of color as a jury commissioner, and never in the history of Fulton County, Georgia, has a Negro been appointed to serve as a jury commissioner, and no member of the same race as defendant has ever been given the opportunity to determine the qualifications of the persons whose names appear on the tax receiver's digest from which said jury commissioners are required to select jurors.

(d) The systematic exclusion of citizens of the colored race from the board of jury commissioners solely because of their race and color, is discriminatory and a denial to this defendant of equal protection of law, in violation of the Fourteenth Amendment of the United States Constitution quoted above.

(e) The fact that no Negro has ever been appointed as a jury commissioner in Fulton County, Georgia, is conclusive evidence of systematic exclusion of citizens of the colored race, from duty as jury commissioners, solely because of their race and color.

7

That the proportionate number of Negro traverse jurors to white traverse jurors in the jury box has been excessively small both in comparison with the proportionate number of Negro citizens to white citizens in Fulton County as a whole and in proportion to the comparative number of Negro citizens to white citizens on the tax receiver's digest, and that this fact is the result of a deliberate and systematic exclusion of proportionate numbers of the Negro race from jury service, and that such exclusion denies the defendant due process of law and equal protection of the laws contrary to the above quoted provisions of the State and [fol. 10] Federal Constitutions, in that it fails to afford him a proportionate number of citizens of his own race before whom his cause has an opportunity for trial. The number of white citizens making returns for the digest of the tax receiver of Fulton County for the year 1951 is 105,035, while the number of colored citizens making returns is 17,736. Therefore, the percentage of colored citizens on the tax receiver's digest is 14 per cent of the total. The number of white citizens in the jury box of Fulton County is 20,509. The number of colored citizens in the jury box is 1115, or 5 2/5 percent of the total.

8

The the names of persons of the white and Negro races are placed in the jury box on slips of paper of different colors, the names of the white citizens being placed therein on white slips of paper and the names of the Negro citizens

being placed therein on slips of paper of yellow or some other color.

9

That the proportionate number of Negro persons to white persons actually selected on panels for jury duty is still less, regularly and systematically, that the proportionate number of Negro persons to white persons on the list of traverse jurors as a whole, and that this results from a further deliberate and systematic exclusion of Negroes from jury duty, which is accomplished, in part, at least, by means of observation, by color at the outset, on slips of paper at the time the names of the jurors are drawn from the jury box, referring to persons of the white and Negro races, respectively, and the systematic failure or refusal to draw a proportionate number of persons of the Negro race (or yellow or colored slips of paper), thus further denying the defendant due process of law and equal protection of the laws contrary to the above quoted provisions of the [fol. 11] State and Federal constitutions, in that this discriminatory practice by State action further reduces the proportionate number of citizens of his own race before whom he may have an opportunity for trial.

10

The Clerk of the Superior Court of Fulton County has not complied with the requirements of Section 59-109 of the Georgia Code in that he has not made out in a book lists of names contained in the grand and traverse jury boxes.

On the contrary, said clerk has on file a list of names, printed in a book, on the cover of which is a certificate signed by the jury commissioners, and the Clerk of the Superior Court as Clerk of the Board of Commissioners.

11

The jury commissioners have not complied with the requirements of Section 59-109 of the Code and supplied properly certified "lists" to the Clerk of the Superior Court. The certificate is defective because said certificate does not certify that said "lists" (if the printed names in a bound book cover is the list), contain all the names placed

in the jury box, but only certifies that said commissioners selected 21,624 names for the jury and from that number 2,000 were selected as grand jurors.

Wherefore Defendant prays that the Court inquire into the facts alleged in the foregoing challenge to the array, and that the challenge to the array be sustained, and the panel dismissed.

This 17 day of September, 1951.

Frank M. Gleason, George Paul Shaw, Attorneys for Defendant.

[fol. 12] Proof of Service (omitted in printing)

[File endorsement omitted.]

Order

Upon hearing the evidence offered in support of the within challenge to the array, it is ordered that said challenge to the array, be, and the same is hereby overruled.

September 17, 1951.

Claude D. Shaw, J. S. C. A. C.

[fol. 13] In Superior Court of Fulton County

[Title omitted]

Amendment to Defendant's Challenge to the Array and Allowance Thereof—Filed September 17, 1951

Now comes the defendant in the above entitled cause and with leave of the court first had and files this his amendment to his challenge to the array of the jurors put upon him in said cause by adding thereto the following paragraph:

That no legal and official lists of the petit jurors of Fulton County, Georgia, is kept or maintained by the Clerk of the Superior Court of Fulton County, Georgia, and that by reason of such failure the defendant is deprived of his

rights to examine and inquire into the manner and way and the legality of the manner in which the jurors put upon him in this case were selected for the reason that there is no legal, official, certified lists of the names of the jurors from which the jurors put upon him were selected to which he may refer for the purpose of determining whether the jurors put upon him have been legally selected for jury duty in the Superior Court of Fulton County, Georgia.

Wherefore, defendant prays that this his amendment be allowed.

Greason & Painter, Shaw & Shaw, by Geo. P. Shaw,
Deft's Attorneys.

Amendment allowed this 17th day of September, 1951, subject to the right of the State to demur thereto.

Claude D. Shaw, J.S.C.F.C.

[File endorsement omitted.]

[fol. 14] In Superior Court of Fulton County

[Title omitted]

Demurrer—Filed September 17, 1951

Comes now the State of Georgia and files this demurrer to and motion to strike the challenge to the array of traverse jurors in the above-styled case and respectfully avers:

(1)

The State of Georgia demurs generally and moves to strike said challenge to the array of traverse jurors on the ground that the allegations set forth therein are insufficient in law to constitute a valid challenge to the array of traverse jurors.

(2)

The State of Georgia further demurs generally to and moves to strike said challenge to the array of traverse jurors on the additional ground that upon the allegations set forth therein the defendant, James Avery, is not en-

titled under the law, the Constitution of the State of Georgia, or the Constitution of the United States to the relief for which he prays.

(3)

The State of Georgia further demurs generally to and moves to strike said challenge to the array of traverse jurors on the additional ground that the allegations set forth therein disclose that all the requirements of the law and Constitution of the State of Georgia, as well as the Constitution of the United States, have been fully complied with, and that no rights to which the defendant is entitled under the laws and Constitution of the State of Georgia, as well as the Constitution of the United States, have been violated.

(4)

The State of Georgia further demurs generally to and moves to strike said challenge to the array of traverse [fol. 15] jurors on the additional ground that it affirmatively appears from the allegations thereof, together with facts of which this court is bound to take judicial cognizance, that none of the accused's legal and constitutional rights have been violated in the impanelling of the traverse jury put upon accused in this case.

Wherefore, it is prayed that this demurrer be sustained, and that said challenge to the array of traverse jurors be stricken.

Paul Webb, Solicitor General. John W. Davis, Carl Copeland, Counsel for the State of Georgia.

[File endorsement omitted.]

[fol. 16] In Superior Court of Fulton County

[Title omitted]

Traverse to the Challenge to the Array of Traverse Jurors—Filed September 17, 1951

Comes now the State of Georgia and, without waiving its demurrer and motion to strike previously filed, files this

traverse to the challenge to the array of traverse jurors in the above-styled case and avers:

(1)

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of said challenge to the array of traverse jurors are untrue and are denied.

For further and affirmative traverse of said challenge to the array of traverse jurors, the State of Georgia avers that none of the rights of the defendant, James Avery, under the laws and Constitution of the State of Georgia, as well as the Constitution of the United States, have been violated.

(2)

That there has been no discrimination whatever against this defendant and he has been accorded fair, equal, legal, and constitutional treatment by all of the officers and courts of the State of Georgia who have dealt with him in this case.

(3)

That the traverse jury put upon the defendant in this case has been impanelled in strict compliance with all of the laws and provisions of the Constitution of the State of Georgia, as well as all of the requirements of the Constitution of the United States, as construed by the appellate courts, including the Supreme Court of the United States itself.

Wherefore, it is prayed that this traverse be sustained and that said challenge to the array of traverse jurors be [fol. 17] stricken.

Paul Webb, Solicitor General. John W. Davis, Carl Copeland, Counsel for the State of Georgia.

Duly sworn to by Carl Copeland. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 18] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ORDER SUSTAINING GENERAL DEMURRERS AND MOTION TO STRIKE—September 17, 1951

The general demurrers to and motion to strike the defendant's challenge to the array of traverse jurors in the above-styled case coming on to be heard, after consideration thereof and argument of counsel:

It is considered, ordered and adjudged that said general demurrers and motion to strike are sustained as to paragraphs 1, 2, 3, 4, 5, and 6 of said challenge to the array of traverse jurors, and paragraphs 1 to 6, both inclusive, are hereby stricken.

It is further considered, ordered and adjudged, that said general demurrers and motion to strike said challenge to the array of traverse jurors be, and the same are, hereby overruled as to paragraphs 7, 8, 9, 10, and 11 thereof.

This the 17th day of September, 1951.

Claude D. Shaw, Judge Superior Court, A. J. C.

[fol. 19] IN SUPERIOR COURT OF FULTON COUNTY

TRANSCRIPT OF TESTIMONY

Mr. George A. Campbell, being first duly sworn as a witness for the defendant, testified as follows:

Direct Examination by Mr. Gleason

My name is George A. Campbell. I am not now a member of the Board of Jury Commissioners of Fulton County. I was through 1948. My term expired, well I guess, in September, 1948. No, I am not sure about the date. The photostatic copy of a certificate sworn to in 1949 appears to bear my signature. It is dated in 1948, but sworn to in 1949 and that is when I finished up. We finished up the list in 1949. As to how we went about selecting members to serve on the grand and traverse jury in Fulton County, we have a tax digest, we take the names from it, from the

tax digest and try as best we can to find out who is eligible for jury duty and pick the ones we think are best suited for the job. We have several ways of determining whether or not a man is eligible. One of them is the City Directory to find out his occupation, to see if he has got a telephone and out of the six commissioners that are pretty well scattered about seven out of ten names called some commissioner would be acquainted, if not personally, in a general way, with the name. No, I do not mean that he would be familiar with the information he had procured from a combination of the City Directory and telephone book and the like. I mean some one of the commissioners would probably know this man, or know him by reputation, the community he lives in, his neighbors and all like that. As a part of it I take the statement of the member of the jury commissioners who might possibly know the man's reputation in the community in which he lives and the rest of the Board determine from that that he is an upright and intelligent man. The other part of it is, well, a discussion from his occupation, his place of residence and from his general reputation. As to what his place of residence would have to do with his reputation of his worth as an upright and intelligent man, well, it would have a great deal. If you lived [fol. 20] down here on Central Avenue; nine times out of ten you would not be eligible for jury duty. Central Avenue is a street. As to what living on Central Avenue would have to do with his eligibility with respect to being an upright and intelligent man, well, it is a section where nearly everybody lives in rented rooms, a very poor class of people and a big amount of our crime originates right down there in that section. As to how sizable a population, I would say, in this county, that live in that section, well, I wouldn't say. In the first place, there are very few of those people's names would be on the tax digest. Very few of those poor people's names would be on the tax digest.

Question: Now, Mr. Campbell, who on the Board of Jury Commissioners decided to make yellow slips for the colored people who are placed in the jury box and white slips for the white people who are placed in the box?

Answer: None of them.

Question: Why did your Commission do that?

Answer: It has been the custom for fifty years or more

to do that and we agreed that would be a big advantage in locating these people from the lists that they are on, if we knew whether or not they were white or colored.

What we did was to follow a procedure that had been adopted for fully fifty years.

Question: And because the jury commissioners of Fulton County fifty years ago typed the names or printed the names of the negroes on yellow tickets before they put them in the box your Board simply carries through on that practice, is that true?

Answer: I wouldn't say that was the reason.

Question: I say is that fact true?

Answer: No, sir.

In explaination as to wherein that is not true, we don't know that far back except from hearsay, but we know that we take the digest which is separate and has yellow sheets [fol. 21] and make the cards for the jury box in the same color as in the tax digest, and one reason for that is that it has been the custom to do that over the years.

Question: (By the Court) I understand you to say for the convenience of locating them?

Answer: That is true. I say we thought further that it would be better to have it that way. As to whether that was the reason for doing it fifty years ago, for the convenience of locating them, I didn't do it fifty years ago. While I am testifying as to the practice and custom and not familiar with why they did it fifty years ago, they might have had a different idea then. The Board of jury commissioners on which I served before my term expired first determined to print the names of negroes in the box on yellow paper so they could be located more easily when we started work. The minutes do not reflect any official action of the Board because we didn't keep minutes. No, I have had no discussions as former chairman of the Board of Commissioners with any member of the Solicitor-General's office respecting my reason for making these tickets yellow.

Question: Now if you have in mind that making the tickets yellow would more easily locate a person, explain why you don't make them all yellow?

Answer: Well, the white people are made on the white tickets and if you make them all just alike you have no way.

of discriminating, or rather deciding which is white and which is colored.

Question: Well, did your Board take that into consideration in drawing a jury, who was white and who was colored?

Answer: No, sir.

As to why you needed to have that information, you need to have it so you can find the people, where the Sheriff's office can find people when they go out to look for them.

Question: Did you have any complaints from the Sheriff's [fol. 22] office that he could not find the people and request that you put the white on white and the negroes on yellow slips?

Answer: We never did put them all on white, couldn't have had any complaints from them because they were all yellow and white. I have heard the bailiff in the Sheriff's office make the complaint that he was having difficulty in locating the citizens who might have been drawn for jury service.

Question: And did you do anything different than had been the practice for the past fifty years to help him locate that man?

Answer: We put all the information on there that we could find.

Question: Well, you didn't have to have a yellow sheet to do that, did you?

Answer: No, we decided that we had better put them on yellow sheets and put the white on white sheets. As to whether I said that the decision to put them on yellow was made because it had been the practice for fifty years, I didn't say we did that on that account.

I would say that it was partly true that we adopted the system of putting the negroes on a yellow ticket because it had been the practice of the commissioners to do it for more than fifty years and for the further reason that it helped the sheriff in summoning, to have the race on a piece of paper.

Question: Now, what else is it to it that influenced your judgment?

Answer: Well, we just thought it was better to have it that way. As to whether or not I have any facts that caused me to come to that conclusion except the facts that you have just asked me about, it is just general experience.

Question: Now, let's go into the general experience, let's have your full views about that, please. What did your general experience have to do with the placing of names on yellow paper?

[fol. 23] Answer: The experience that if you knew whether a man was colored or white when you went looking for him, it was much easier to eliminate him on account of his color and look him up where he lived.

As to how many we eliminated because of their color, we didn't eliminate anybody because of their color, those on yellow slips we put on the jury lists. As a jury commissioner and our authority to put anyone on the jury list, well, that was our job to make up the jury lists. No, it wasn't our job to select from the tax digest the names of upright and intelligent people, put their names on a ticket and put it in the box. We first made up a list and then we decided from that list which one would be grand jurors and then we cut them up and divided them and put the white on white cards and the colored on colored cards, but we did not eliminate anybody on account of color. As to what stage in our procedure that we used the yellow list, well we started first, I wouldn't swear this, but I think we started on the colored list first, went over that list and took the ones we thought were eligible for jury duty. We took the yellow sheets from the tax digest and we first wrote the names down on white sheets, then when we made the cards for the jury box we put them on colored cards. In addition to putting the man's name from the tax digest on the card or on the sheet, we put his address and we got that from the tax digest, usually. Sometimes it might have been left off, but I could not say that was a constant practice, but I would say, as a general practice, we found most of the addresses on the tax digest.

Question: And if you had that information and the address was on there and his name was on that part of the tax digest that is required by the Constitution to be yellow, why didn't you just put his name on a white piece of paper with the white folks and put it in the box?

Answer: For the same reason I just explained to you. When the cards are turned over to the sheriff's office, if he [fol. 24] didn't have yellow cards and white cards, he wouldn't know whether they were white or black. As to

what my duties as a member of the Board of Commissioners had to do with turning over cards to the sheriff's office, well, I didn't turn them over.

Question: What concern was it of your Board of Commissioners whether or not the sheriff's office was going to have any difficulty in locating a man?

Answer: Because I heard them complain of it.

Question: You heard them complain?

Answer: Yes.

Question: So you merely wanted to be helpful to the sheriff.

Answer: Sure. You are showing me what purports to be a book of grand jurors and petit jurors with a number of names printed in there and their addresses and with a certificate apparently bearing my signature. With respect to this book and as to whether I have ever seen it before, No, sir, I have not. I do not know where it came from. They had it printed I presume. I couldn't tell.

Question: You say you have never seen it before?

Answer: Not that particular book.

Question: Then if you have never seen the book before, you as chairman of the board of jury commissioners did not certify as to the names that are in that book, did you?

Answer: We certified the names that we turned over, that we put into the jury box.

Question: Do you know that book contains the names that you turned over?

Answer: No, sir, I have not verified it at all. Mr. Body is here today, he did not examine and verify the contents of this book in my presence. You will have to ask him. I couldn't tell you whether one member of the Board did it while the others looked on or not, but I did not see him [fol. 25] examine and verify the contents of the book in my presence. The same thing is true as to Mr. Chandler who is not here, but the other gentleman, Mr. Matthews, is here.

Under instructions from the Court the witness examined the certificate on the cover of the book which contained printed names of individuals on the jury list.

The witness then continued:

He asked me if I had seen this book and verified it and if I had verified the list and I said no. Yes, I have seen that certificate. I did not examine the book.

Question: This is not the list that was put in the box?

Answer: That was a separate list, this is a copy of it.

Question: Now, did you check this to know that?

Answer: No.

Question: How do you know it is a copy?

Answer: It is supposed to be.

As to who on the Board would know about those names on the books, well, I don't know that any of them would know. I don't know. I did not see any of them verify the list. I think Mr. Simmons, the Clerk of the Court, was present at some of the meetings. As to what particular meetings he attended, I think at this particular meeting he was there, and he was with us when we went to the printing office and put the cards in the jury boxes. As to the information about the printing office, or taking the names of some particular printer in Atlanta, or having someone under contract with the county, or how we do that, Mr. Simmons had it done. Mr. Simmons, in his official capacity as Clerk of the Board of Jury Commissioners. After the Board of Jury Commissioners selected the names from the tax digest, as I have testified, we make up the list and turn the list over to Mr. Simmons. We see the list again when the printer has completed the list and has it all ready, we go and take those names and have them cut up in sections, put them in the [fol. 26] jury box.

Question: Do you or other members of the Board of Jury Commissioners ever take the list, after you have sent it to the printer and after the printer has done the printing and after the list and the printed work is returned to you, and other members of the Board then hold another session and check all that over again?

Answer: No, sir.

Question: Then you necessarily must rely on the accuracy of the printer in printing accurately the list that you turn over to him?

Answer: That is right. Everybody makes mistakes. There could be a mistake in printing. But we took those

lists from the printer and checked them as closely as we could. We checked them with the other members. We did not check them back with those here, but with the list that we put in the jury box. I don't know, but I think this was printed at the same time as the other list was printed, that is, the other list that was put in the box. As to whether or not this is a copy of the other list and as to how I know that if I did not check it, I took somebody's word for it.

Cross-examination.

By Mr. Carl Copeland:

Yes, we as commissioners went to the tax digest of Fulton County and checked the returns of Fulton County. We checked every one of them and made up a list of those returns of both the white taxpayers and the colored taxpayers, then we took those lists and considered them individually as to what we thought of them as being fit for jury service in compliance with the law, then we took that list and made up a list of those that we thought were suitable for jury service. We didn't try to put all the names in there, we made a selection of names, a selection of the list as to colored and as to [fol. 27] white. At no time did we eliminate any person by reason of the fact that he was of a different color from some other person. We did not eliminate a person because he was a colored man and we didn't eliminate a person because he was a white man. Yes, we have a secretary or clerk of the commission. The clerk of the commission is a lady sitting over there. She was the one that did the typing. Mr. Simmons is the legal secretary of the commission and he handles the printing of the list, and so forth and what he did with them I do not know. We simply revised the list and turned over to him the ones we thought should go in the jury box. After the list was printed we checked that list back with the list which we had furnished to him.

[fol. 28] Mr. J. W. SIMMONS, being first duly sworn, testified as follows:

Direct examination.

By Mr. Gleason:

I am Mr. Simmons, the Clerk of the Superior Court of Fulton County, Georgia, and by virtue of my duties as Clerk of the Superior Court I am likewise the Clerk of the Board of Jury Commissioners. As to what active participation I took in the selection of jurors, grand and traverse, for Fulton County, I didn't take any part in the selection of the names that go in the jury box. I do not attend all of the meetings of the Board of Jury Commissioners. I name one of the ladies in my office to act as secretary, typist or stenographer to the jury commission, Mrs. Truitt. She is a deputy clerk of Fulton Superior Court, but there are some matters I attend to myself, the printing of the lists and so forth.

Question: Now, just explain the machinery that is in operation from the time the Board of Jury Commissioners takes the tax digest and selects the names to make up the tickets that are placed in the jury boxes, if you know?

Answer: I am looking at the official list of the jurors in the jury boxes at this time. This revision was completed in July of '49, begun in August of '48, took about eleven months. The Jury Commission adopted this method and this revision and took the books from the tax receiver's office.

The books I have reference to are the tax returns, and they were the returns that had been put in bound volumes, they are the returns of the taxpayers themselves. We employed a group of young women assistants who went through these returns and made a card on each return showing the name and address, if the return showed it, the property and so on, and information they took off in condensed form for the jury commission. After they had prepared a number of these cards, the Commission would meet and take these cards and study them, the information [fol. 29] contained on them, and make a selection. If they

selected a certain name, that name was given to Mrs. Truitt who typed it, and she kept in that manner a typewritten list of all the names selected at different meetings of the Commission. Now, do you want me to go ahead and complete the story? When the jury commission had completed its work—some few days before they completed the work, they told me the approximate number of names that would be in the list, just in round numbers; and I asked the purchasing agent to obtain bids on the printing of these names on tickets. Well, when the list was finally completed, that list of names was furnished to the printer and when the printer returned a proof to the jury commission, and upon the completion of this checking, the proof sheets were sent back to the printer with such corrections, if any, that were made on it, and he then printed those lists. Now, we have in this county three jury boxes. The printer was requested to print four copies of the list, the petit jury; three of the copies were cut up into tickets for the three jury boxes; one copy was retained and placed in this binder. They printed two copies of the grand jury list, one for the grand jury box and one to be placed in this binder. When the printer notified us that the printing was ready, the jury commission went to the printing office. I went with them and we carried the four jury boxes, the grand jury box, the Superior Court jury box, Civil Court jury box and box for the Criminal Court of Fulton County, and in my presence and in the presence of the jury commission, these sheets were cut up by cutting them into strips and then cutting this way, making tickets out of them, and these cuttings were placed in three separate boxes. One grand jury list was cut up in that same manner and put in the grand jury box and this certificate was prepared and one copy of the printing was put in this binder and certificates attached to it. The young ladies who are employed are in the Commissioners' [fol. 30] office, the jury commissioners' office. They take in the first instance the tax returns and take off information and make a card for the Board of Jury Commissioners. We have these cards in the office. I don't know whether or not the Board of Jury Commissioners themselves check the information taken by the clerks employed by them from the tax returns turned over by the tax receiver. I did not as Clerk of the Board of Jury Commissioners ever do it

myself. As to why the Board of Jury Commissioners and myself as Clerk do not take the tax digest, which is in bound form, and after it has been approved by the State Revenue Department, and make our selection from that Digest after it becomes an official digest, rather than take it from the returns which are not official documents until accepted by the State Revenue Department, well, the law requires that the jury commission begin its work on the first Monday in August or within thirty days thereafter. No Fulton County Digest is ever ready at that time. From the cards made up by the clerks, the jury commissioners then decide who they will select for jury service. I am not certain whether yellow cards are made by these clerks in taking the names of negroes off the tax returns or whether they are white. I will have to check them and see. After the Board of jury commissioners decide who they will select from the cards prepared by their employees, they make up the list and I take the list to the printer. After the jury commission has finished the task of selecting names and set it on a list, we send to the printer a typewritten list of those names.

The names that the jury commissioners select are the names that appear on the cards taken by these ladies or these clerks whom they employ to take that information from the tax returns and the names are put on a list when they make a selection and taken to the printer and the printer prints the list, but he first makes up a proof which is sent to the jury commissioners for verification and the jury commissioners have a copy of the list that they sent [fol. 31] to the printer, they make it up in duplicate, make carbon copies of it. Then that list goes back to the printer for printing, the proof sheet that goes back with such changes or corrections as the jury commission has made to the printer and from that corrected list he prints the names that go in the jury boxes. I instruct the printer to print the names of the negroes on the yellow sheets.

Question: Then actually the address of the man selected, the negro juror has already been found and determined, he has already been selected, and the yellow sheet don't help anyone to locate him at all because he has already been selected; isn't that true, at the time the yellow sheets are made?

Answer: He has already been selected as a prospective juror.

Question: Then the fact that his name was put on a yellow sheet wouldn't be of any assistance in helping anyone determine whether he could be located as a prospective juror?

Answer: Well, that is a problem for the process server. If he knows that man is white or that man is colored, he can locate him easier.

Question: Does the process server have access to those yellow tickets in the jury box?

Answer: Nobody has access.

Question: Then he wouldn't know from the yellow sheet, that wouldn't be of any assistance to him, would it?

Answer: Well, when a jury is drawn by the judge from the box, if he draws a yellow ticket out, a notation to that effect can be made on the drawn list and he would know it.

Question: Well, he could make that if it was on a white piece of paper, he could do the same thing?

Answer: Why, certainly, he could make one white and one colored if he wanted to. If the word colored was indicated on the white slip when the name was picked up by the person drawing the jury and read off, there is nothing to prevent the Board from putting his address under that. [fol. 32] I don't know any reason why it couldn't be done. I would think that would serve the same purpose as having a yellow ticket to designate him as a negro.

Question: Now, do you, after that list is certified and filed by the Board of Jury Commissioners, do you then copy that list in a book?

Answer: No, that is what I call the book.

Question: That is it?

Answer: Yes, sir.

Question: And it is the book and list both?

Answer: That is correct. That is the book containing a list of names that are put in the jury box. That is an exact duplicate of the names in the box because it is run off the same type. Although I did not check that personally, I am positive. I didn't go out there when they were actually printing it.

Question: Then you suppose it is?

Answer: I believe it is.

Q. That is better.

I think about one hundred colored people in Fulton County appear on the book that I, as Clerk, have certified as members of the Grand Jury and I can count them for you. I have now procured the number of names on that list who are on the Grand Jury who are colored, and the same thing for the petit jury. There are one hundred names in the grand jury and are colored, and there are two thousand grand jurors in all, one hundred of which are colored, making nineteen hundred white and one hundred negroes. I am not familiar with the population of Fulton County, that is, white people, and I do not know. As to the number of people whose name appears on the tax digest, colored and white, in round numbers there is between 110,000 and 120,000, somewhere in there.

The total number of names in the petit jury box now is 21,624, 20,509 of which are white.

[fol. 33] Cross-examination.

By Mr. Copeland:

I am in my twenty-second year as Clerk of the Superior Court. I have been assisting in the drawing of the jury and compiling jury lists for that length of time. I have often seen negroes serving on the petit jury in this county. They serve practically every week, practically every week we have jury business. Occasionally they may not, but it is the usual thing. As to how many usually are on the jury here in this county, my best estimate of it, there would be six or eight every week, actually impaneled on the jury and we have negroes serving on the grand jury. As to whether or not there are any negroes on the present term of the grand jury, when the present grand jury was impaneled there were no negroes at the time and we didn't have twenty-three grand jurors present, the Judge drew some additional names and secured other men to serve. I do not know whether any of them were negroes or not. I do not think, however, any negroes are on the present grand jury. There were five, I believe, on that grand jury in July and August and they actually served on the grand jury.

Defendant introduced in evidence a certified copy of the

certificate attached to the cover sheet of the book containing the names (printed) of persons selected for jury service by the jury commissioners of Fulton County, Georgia. The certificate being as follows:

"CERTIFICATE OF THE JURY COMMISSIONERS

1948

STATE OF GEORGIA,
County of Fulton:

We, the undersigned, Jury Commissioners of the County of Fulton, and State of Georgia, met on the first Monday in August, 1948, for the purpose of revising the jury boxes, both petif and grand, of the County of Fulton.

All of the Jury Commissioners took oath of office before the ordinary, prior to meeting. We were charged by the [fol. 34] Honorable Judge Virlyn B. Moore, and went into session. Mr. George A. Campbell was elected chairman of the commission, and soon work was completed in Room 221. Mr. Wiley L. Moore began service with us but pressure of business made it necessary for him to request excuse.

We worked for 83 days preparing the lists. These names were taken from the tax returns for 1948, which were furnished to us by the tax receiver as required by law. We selected 21,624 names for the petit jury and from this petit jury list, we selected 2,000 names as grand jurors. The lists were turned over to the printer. We reconvened on May 25, 1949, to arrange for checking of the lists by our clerks and on July 25, 1949, met for the last time, destroying old tickets in present boxes, refilling with new lists of names.

We certify that we ourselves placed slips containing the individual names of the petit jurors in a box for the Superior Court, and in the box for the Criminal Court of Fulton County, and in the box for the use of the Civil Court of Fulton County. We likewise placed 2,000 individual slips in the grand jury box containing the names of the grand jurors.

(S.) Geo. A. Campbell, Chairman. (S.) T. D. Body, Sr., Henry W. Chandler, Albert G. Matthews.
(Commissioner Seal.)

(S.) J. W. Simmons, Clerk of the Superior Court of Fulton County, Georgia.

Sworn to and subscribed to before me this the 25th day of July, 1949. (S.) John W. Walton, Notary Public, Fulton County, Georgia."

[fol. 35] DEPUTY CLERK'S CERTIFICATE

"STATE OF GEORGIA,
County of Fulton:

I, Lee Earl Largen, Deputy Clerk of the Superior Court of Fulton County, Georgia, do hereby certify that the within and foregoing is a true and correct copy of Certificate of the Jury Commissioners for the year 1948, which appears on the front page of Jury List, all of which appears of file and record in this office.

Given under my hand and seal of office This the 1st day of June, 1951.

(S.) Lee Earl Largen, Deputy Clerk, Superior Court, Fulton County, Georgia." (Seal of Superior Court, Fulton County, Georgia.)

[fol. 36] Defendant introduced in evidence a cloth-bound bulky book containing printed names of persons in Fulton County, Georgia, selected by the Jury Commissioners of said County for grand and petit jury service in the manner shown by the evidence, which said book had attached or pasted to the inside cover thereof the certificate of the jury commissioners and the Clerk, Mr. Simmons, said certificate being dated the 25th day of July, 1949, exact copy of which appears on pages 14, 15, of the brief of evidence.

This book contains names of 1900 White Grand Jurors, 100 Colored Grand Jurors, 20,509 White Petit Jurors, 1,115 Colored Petit Jurors.

It was stipulated and agreed that according to the tax digest of Fulton County, Georgia, there were 105,035 white

people and 17,736 colored people on the tax digest for the year 1950.

It was stipulated and agreed that Fulton County had a population of 671,797, according to the 1930 census.

It was stipulated and agreed that of the total population of 663,771 people, according to the 1950 census, that 165,814 were colored, and 505,983 were white people.

JUDGE VIRLYN MOORE, being first duly sworn as a witness, testified as follows:

Direct examination.

By Mr. Gleason:

I am the oldest Judge or Presiding Judge of the Superior Courts of Fulton County, Georgia. All are the same rank. We arranged the drawing of the Grand and Traverse Jurors as follows: We have one Judge who is known as the presiding Judge, the Judge in chambers, and he is the Judge that draws the juries and organizes them. For instance, Judge [fol. 37] Wood is the chambers Judge, this term, he drew the jury, and in August I was the presiding Judge and I drew the jury. That was in August, 1951, and the 1951 panel is the panel that is put upon for the trial of cases at this term of court. I will explain for the record the mechanics employed by me in drawing a jury in Fulton Superior Court. The jury box is brought to the Judge's chambers in the court room by the Deputy Sheriff and we have a Deputy Clerk who is a young lady and a typist; she comes up and the jury box is unlocked and the seal broken by the Judge and the jury is in two divisions, box No. 1 and box No. 2. We take the tickets with the names on them out of No. 1. I don't know how the other judges do, but I reach down and pick up maybe two or three or half a dozen tickets and put them in a little box which we have for that purpose. After I get a number in there, say forty or fifty, or something like that, they are turned over to the Deputy Sheriff who turns them over to the Deputy Clerk who makes a typewritten list of them. Those that are put on the list are put back in box No. 2 or apartment No. 2, the jury box, and then some more are taken out until we get the required number. We generally draw from 150 to 200 jurors for each division of the

court, that is, the Civil and Criminal divisions. That is the operation. This court, called the Fulton Criminal Division of the Superior Court is the Criminal Division of Fulton Superior Court and the jurors that I drew in the manner I have just testified appear on the panel put upon the defendant in this case. The jury box on which I break the seal has two compartments, Compartment No. 1 and No. 2, and when I spoke of reaching in Compartment No. 1 and drawing out two, three or four tickets and putting them in another box, that is a small box that we put in for the purpose of turning it over to the clerk to copy.

Question: In other words the tickets go from panel No. 1 into another box and not back into panel No. 2?

[fol. 38] Answer: No, they don't go into Compartment No. 2 until after they have been put on the list by the Deputy Clerk; then they go back in compartment No. 2 of the jury box.

Question: Now, as you draw the tickets out of compartment No. 1, two or three at the time, do you read the names on those tickets?

Answer: I do not.

Question: Do you look on those tickets?

Answer: Sometimes I do and sometimes I don't.

Question: You merely go through the mechanical process of depositing them in a cigar box?

Answer: Well, it is a little cigar box used for that purpose.

Question: Then the cigar box—how many names do you put in that cigar box before you quit drawing, Judge?

Answer: Sometimes you draw forty or fifty, enough to get them started. There is no special number, we draw two or three times, maybe four times to get enough to make out that list.

Question: Now, the Deputy Clerk of the Superior Court, I presume, is the person you have reference to as the Deputy, one of the Clerk's deputies?

Answer: Well, the Deputy Sheriff, I turn them over to him and he takes them and arranges them and puts them over to the Depuy Clerk.

Question: No one knows what names you have put in the cigar box until the Deputy Clerk or the Deputy Sheriff gets them arranged, is that it?

Answer: Well, you would know if you looked at them, I don't know then, I don't really know after they make the list unless I read it over, who is on there; very often I have drawn my own brother and not known he was on it until he appeared here.

The Deputy Sheriff puts the names out in front of the [fol. 39] typist who is a Deputy Clerk so she can type them. He puts every name out before the typist that I draw from the jury box by putting them on her desk, puts them out in front of her and I am right there when that is going on and I am there for the completion of the whole process all the way through the whole time, yes, sir. When the stenographer has copied off the tickets on the list the deputy puts them in a little cigar box marked No. 2, which is another box which is No. 2 and when they get through copying them, then I take that and put those tickets back in compartment No. 2 of the jury box. I drew this jury on August 19th of this year, I drew it, I guess you would call that the Judge's chambers, the outer office there, connected with the court room, 405, I think—I think that is 405 or 406. Yes, I hold court in that room. That is a court room now for the judge in chambers. He holds mostly motions or non-jury matters. Of course there have been a lot of juries in that court room. There is a jury box and it is all equipped for jury business.

Question: Now, Judge Moore, when you draw these tickets out of the panel No. 1 of the jury box, do you ever notice any yellow tickets?

Answer: Some yellow tickets in there, yes, sir.

Question: Are those visible to you as you lift the tickets out of the panel No. 1?

Answer: Yes, sir. As to why those tickets are printed yellow I do not know. I have been here twenty-five years and when I came they were that way and they have been that way ever since. I don't know why they have yellow and white and why that custom ever started. That has been the custom in this County for many, many years.

The difference in color is not of any material help to me in performing my duties in drawing a jury. None at all.

I do not pay any attention at any time to the color of [fol. 40] those tickets. I don't think I ever picked up one ticket unless we just happened to need one more to fill out

the panel. I just reach in there and pick out between my finger and thumb a bunch and if there is a yellow one in there, it is there, but of course there are a great many more whites than yellow, but if a yellow is in there when I pick it up, I put it down. That is the way it goes.

Cross-examination.

By Mr. Copeland:

At the particular time when I was drawing these jurors for this term of court, I probably looked down into panel No. 1, some time. I probably looked down but I didn't pick out any special tickets or try to get any special color or any special person. I didn't make any selection as to white and yellow slips. Absolutely none. I have never at any time in drawing a jury in this county made any selection as to whether they were white persons or colored persons that were in the box. I have been Judge of this court—on my twenty-fifth year now. I have petit jurors that are colored here in court. Sometimes we have an entire panel or more. I think it was five colored grand jurors last time here. It is a common practice for both colored and white to serve on the jury. It certainly is, it occurs very often.

Redirect examination.

By Mr. Gleason:

Question: I don't know whether I made it clear—it is not clear to me—after you draw the name and give it to the typist or the deputy to give to the typist to type, do you make any inspection of the specific name that you have withdrawn from panel No. 1 in the jury box to be sure that name is copied on the list by the stenographer and the deputy clerk?

Answer: Well, I can't say that I watch every ticket as it is put down; I give it to them and they are there working [fol. 41] under my supervision and I suppose if they wanted to slip one in the wastebasket or something they could do it without my seeing it, but I am there supervising and of course a Judge can't watch everything.

At the conclusion of the evidence, the court overruled the

challenge to the array on each and every ground and ordered the case to proceed.

[fol. 42] IN SUPERIOR COURT OF FULTON COUNTY

INDICTMENT FOR RAPE

Number —

STATE OF GEORGIA

v.

JAMES AVERY

JUDGMENT—September 17, 1951

The challenge to the array of traverse jurors as amended having been traversed by the State, and having been presented to the court for determination; after hearing evidence and argument of counsel;

It is considered, ordered and adjudged that said challenge to the array of traverse jurors as amended be, and the same is hereby overruled on grounds 7, 8, 9, 10, and 11, grounds 1, 2, 3, 4, 5, and 6 having been previously stricken by the court on motion of counsel for the State.

This the 17 day of September, 1951.

Claude D. Shaw, Judge Superior Court, A. J. C.

[fol. 43] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

Walker Superior Court—Transferred to Fulton Superior Court on order changing venue.

BILL OF EXCEPTIONS PENDENTE LITE—Filed September 18, 1951

Be it remembered in said stated matter there came on to be heard before the trial of said case on the merits, the challenge to the array of traverse jurors, the demurrer of

the State of Georgia thereto, and the issues of fact made by the answer and traverse to said challenge;

Be it further remembered that the Hon. Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit, took under consideration the demurrer of the State of Georgia to the challenge to the array of traverse jurors and after argument of counsel and consideration by the Court, the Honorable Judge Claude D. Shaw entered the following order, to wit:

"The General demurrers to and motion to strike the defendant's challenge to the array of traverse jurors in the above-styled case coming on to be heard, after consideration thereof and argument of counsel;

"It is considered, ordered and adjudged that said general demurrers and motion to strike are sustained as to Paragraphs 1, 2, 3, 4, 5, and 6 of said challenge to the array of traverse jurors, and Paragraphs 1 to 6, both inclusive, are hereby stricken.

"It is further considered, ordered and adjudged that said general demurrers and motion to strike said challenge to the array of traverse jurors be and the same are, hereby, overruled as to paragraphs 7, 8, 9, 10, and 11 thereof.

"This the 18th day of September, 1951.

(S) Claude D. Shaw, Judge Superior Court, A. J. C."

[fol. 44] To this order of the court sustaining the general demurrers of the State of Georgia to grounds 1 to 6 inclusive of the challenge to the array, the defendant, James Avery, then and there excepted and now excepts and assigns the same as error and says that the court erred in sustaining said demurrers and striking Paragraphs 1 to 6 inclusive of said challenge and that the order of the Court aforesaid striking Paragraphs 1 to 6 inclusive of said challenge to the array was and is contrary to law.

Be it further remembered that there then came on to be heard before the Hon. Judge Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit, the issues of fact made by the traverse and answer to said challenge, that evidence was introduced both by the defendant, James Avery, and the State of Georgia; that said issue of fact was submitted to the court by said evidence and that the

court, after consideration of said evidence, entered the following order, to wit:

"The challenge to the array of traverse jurors as amended having been traversed by the State, and having been presented to the Court for determination; after hearing evidence and argument for counsel:

"It is considered, ordered and adjudged that said challenge to the array of traverse jurors as amended be and the same is hereby overruled on grounds 7, 8, 9, 10, and 11, grounds 1, 2, 3, 4, 5, and 6 having been previously stricken by the court on motion of counsel for the State.

This 18th day of September, 1951,

(S) Claude D. Shaw, Judge Superior Court, A. D. C."

To this order of the court overruling and denying said grounds of challenge to the array, the defendant, James Avery, then and there excepted and now excepts and assigns the same as error and says that the court erred in refusing to sustain the grounds of challenge made by the defendant, and that the order of the court thereon was and is contrary [fol. 45] to law.

Wherefore, defendant prays that this his Bill of Exceptions Pendente Lite, be certified to as true and ordered placed on the record.

This 18th day of September, 1951.

Frank M. Gleason, George Paul Shaw, Attorneys for Defendant.

Address:

Rossville, Georgia
LaFayette, Georgia

CERTIFICATE TO BILL OF EXCEPTIONS PENDENTE LITE

The foregoing bill of exception pendente lite is hereby allowed and certified to as true. Let the same, with this certificate, be placed upon the records.

This 18th day of September, 1951.

Claude D. Shaw, Judge Superior Court, Atlanta Circuit.

[File endorsement omitted.]

[fol. 46] IN SUPERIOR COURT OF FULTON COUNTY

BILL OF EXCEPTIONS—Filed January 24, 1952

GEORGIA, FULTON COUNTY:

To the Supreme Court of the State of Georgia:

Be is remembered that in the case of the State of Georgia versus James Avery, the same being indictment No. 4169 returned by a Grand Jury in the Superior Court of Walker County, Georgia, on the 21st day of February, 1951, charging James Avery, a negro, with the offense of rape on a white woman, the defendant therein, James Avery, before the return of said indictment by a Walker County grand jury, and after being informed of the intention of the Solicitor-General of the Lookout Circuit to present an indictment against him to said Walker County grand jury charging him with the offense aforesaid, filed his challenge to the array of grand jurors in the Superior Court of Walker County, Georgia, alleging the unconstitutionality of the statute by virtue of which said grand jury was drawn, and the violation of certain specific provisions of the State and Federal Constitutions, the unconstitutional application of a constitutional law, the failure to comply with other statutory provisions by the Clerk of the Superior Court of Walker County, Georgia, respecting the making and keeping of a correct jury list, the invalidity of the certification of the lists and a failure to keep a book containing the names of jurors in the box, as well as other grounds of objections to the grand jury which was about to consider said indictment against him, all as shown by said challenge to the array; that said challenge to the array was properly served upon the Solicitor General of the Lookout Judicial Circuit; that after notice to said Solicitor General, said challenge to the array came on to be heard before the Honorable Freeman C. McClure, Judge of the Superior Court of the Lookout Judicial Circuit; that the State filed no traverse to the allegations of fact contained therein; that evidence was introduced by the defendant in support of his grounds of challenge to the array, and the court, after the introduction of evidence and a full hearing on all issues of law and facts raised by said challenge and

[fol. 47] after argument of counsel thereon, entered the following order, to wit:

"The within challenge coming on regularly to be heard, upon evidence heard, and after the argument had, the same is hereby overruled.

This 19th day of February, 1951.

(S.) Freeman C. McClure, Judge Superior Court, Lookout Circuit."

First Assignment of Error

To this order of the court overruling defendant's challenge to the array the defendant, within the time provided by law tendered his bill of exceptions pendente lite, and the same was duly certified as true and filed on the 21st day of February, 1951, and the defendant, James Avery, then and there excepted to the order of the court overruling his challenge to the array of grand jurors, and now excepts and assigns error on the said bill of exceptions pendente lite and upon the rulings thereon excepted to, and says that the court erred in overruling said challenge to the array, and that the order of the judge overruling said challenge to the array, was and is contrary to law.

Be it further remembered that after the return of said indictment by a Walker County grand jury, charging the said James Avery with the offense of rape, that the said James Avery filed, in the Superior Court of Walker County, Georgia, his certain motion for a change of venue, alleging therein that there was a probability of lynching in Walker County, Georgia. A hearing was had on said motion for change of venue and said application was denied. Within the time provided by law, the said James Avery filed his certain bill of exceptions to the Court of Appeals of Georgia, assigning error on the order of the judge of the Superior Court of Walker County, Georgia, refusing to grant a change of venue; that the Court of Appeals of Georgia, on April 10, 1951, and after consideration of said appeal, and all things necessary to properly effect said appeal, reversed the judgment of Walker Superior Court and [fol. 48] ordered a change of venue. (See Avery vs. State, 83 Ga. App. page 700); that after the reversal of said case

by the Court of Appeals of Georgia, a judgment was duly entered on the remittitur in Walker Superior Court, making the judgment of the Court of Appeals of Georgia the judgment of Walker Superior Court, and thereafter, on the 22nd day of May, 1951, an order was duly entered by the Honorable Freeman C. McClure, Judge of the Superior Court, Lookout Judicial Circuit, granting said change of venue and changing the venue of said case to the Superior Court of Fulton County, Atlanta, Georgia, to which court said case was transferred for trial.

Be it further remembered that said case came on to be tried in the Superior Court of Fulton County, Georgia, on the 17th day of September, 1951, before the Honorable Claude D. Shaw, and a jury. Before arraignment said defendant, James Avery, filed his certain challenge to the array of traverse jurors put upon him in the Superior Court of Fulton County, Georgia, and thereafter filed his certain amendment to said original challenge to the array; that the State of Georgia filed its demurrer to and motion to strike the challenge to the array of traverse jurors and also filed its traverse to the allegations of fact set up in the defendant's challenge to the array.

A hearing was had on the said demurrer and motion to strike said challenge to the array before the Honorable Claude D. Shaw, Judge aforesaid, who, after argument of counsel thereon entered the following order, to wit:

"The general demurrers to and motion to strike the defendant's challenge to the array of traverse jurors in the above-styled case coming on to be heard, after consideration thereof and argument of counsel: It is considered, ordered, and adjudged that said general demurrers and motion to strike are sustained as to paragraphs 1, 2, 3, 4, 5, and 6, of said challenge to the array of traverse jurors [fol. 49] and paragraphs 1 to 6 both inclusive are hereby stricken. It is further considered, ordered, and adjudged that said general demurrers and motion to strike said challenge to the array of traverse jurors be and the same are, hereby overruled as to paragraphs 7, 8, 9, 10, and 11 thereof.

This 18th day of September, 1951.

Signed: Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit."

Second Assignment of Error

To this order of the court sustaining in part the State's demurrers and motion to strike, as aforesaid, the defendant, within the time provided by law, tendered his bill of exceptions pendente lite, and the same was duly certified as true and filed on the 18th day of September, 1951, and the defendant, James Avery, then and there excepted to the order of the court sustaining in part the State's demurrers and motion to strike, and now excepts and assigns error on the said bill of exceptions pendente lite, and upon the rulings thereon excepted to, and says that the court erred in sustaining in part the demurrers and motion to strike, and that the order of the court sustaining in part said demurrers and motion to strike was and is contrary to law.

Be it further remembered that there came on to be tried before the Judge, without the intervention of a jury, the issues of fact as made by the traverse filed by the State of Georgia to the challenge to the array of traverse jurors; that evidence was introduced by the defendant in support of the allegations of fact set forth in his challenge to the array of traverse jurors and that after the introduction of evidence, and the argument of counsel, the Honorable Claude D. Shaw, Judge, entered the following order, to wit:

"The challenge to the array of traverse jurors, as amended, having been traversed by the State, and having been presented to the Court for determination after hearing evidence and argument of counsel: It is considered, [fol. 50] ordered, and adjudged that said challenge to the array of traverse jurors, as amended, be and the same is hereby overruled on grounds 7, 8, 9, 10, and 11, grounds 1, 2, 3, 4, 5, and 6, having been previously stricken by the court on motion of counsel for the State.

This 18th day of September, 1951.

Signed: Claude D. Shaw, Judge Superior Court, Atlanta Judicial Circuit.

Third Assignment of Error

To the foregoing order of the Judge overruling and denying the prayers of said challenge to the array of traverse jurors, the defendant, within the time provided by law,

tendered his bill of exceptions pendente lite, and the same was duly certified to as true and ordered placed on the record and filed on the 18th day of September, 1951, and the defendant, James Avery, then and there excepted to the order of the judge denying and overruling the prayers of his challenge to the array of traverse jurors, and now excepts and assigns error on said bill of exceptions pendente lite, and upon the rulings thereon excepted to, and says that the judge erred in denying and overruling the prayers of said challenge to the array of traverse jurors; that the evidence offered in support thereof demanded that said challenge to the array of traverse jurors be sustained and that the order of the court thereon was and is contrary to law.

Be it further remembered that said case then came on to be tried in the Superior Court of Fulton County, Georgia, before the Honorable Claude D. Shaw, Judge, and a jury. The defendant entered his plea of not guilty upon arraignment; that defendant's counsel was supplied with Panels 6, 7, 8, 9, 10, and 11 of prospective traverse jurors, each of said panels containing the names of twelve men; that, while defendant was a negro, charged with the offense of rape [fol. 51] on a white woman, the entire traverse jury of sixty men out upon defendant were all white and there were no colored jurors on any of said panels; that from the jurors put upon defendant a jury was stricken and said case proceeded to trial.

Evidence was introduced in behalf of the State of Georgia in support of the allegations of said indictment. After the State closed its proof, said defendant made an unsworn statement in his own behalf, contending that he was entirely innocent of the crime charged, that the prosecutrix who did not know him had made a mistake in his identity.

After a lengthy trial, argument of counsel, and charge of the court, the jury returned a verdict on the 20th day of September, 1951, finding defendant guilty of the offense of rape, without a recommendation, and pursuant to the verdict of the jury the Honorable Claude D. Shaw, Judge, as required by the laws in such cases, then and there imposed a sentence, sentencing defendant to death by electrocution.

Be it further remembered that thereafter and within the

time provided by law, defendant filed his certain motion for new trial; that a rule was issued thereon, and service acknowledged; that by appropriate orders of the Honorable Claude D. Shaw, Judge, the hearing thereon was continued from time to time, until said motion for new trial was disposed of as hereinafter alleged.

Be it further remembered that defendant, within the time provided by law, presented his amended motion for new trial, the same having been duly allowed, approved, and ordered filed by the Judge, all as shown by the order of the Judge on the amended motion for new trial; that a brief of evidence was duly approved and allowed by the court and was duly filed on the 11th day of January, 1952; that said motions for new trial, as amended, came on to be heard before the Honorable Claude D. Shaw, Judge of the Superior Court, Fulton County, Atlanta Judicial Circuit, on Janu- [fol. 52] ary 11, 1951, when the Judge, after consideration of said motion for new trial as amended, the brief of evidence in support thereof, and argument of counsel thereon, entered an order overruling said motion and denying defendant a new trial.

Fourth Assignment of Error

To this order and judgment of the court overruling each and all of the grounds of the motion for new trial as amended, the defendant then and there excepted, and now excepts, and assigns error thereon as being contrary to law, and says that the court erred in overruling said motion for new trial as amended on each and all of the grounds stated in said original and amended motion for new trial, and that the order of the court overruling and denying said motion for new trial as amended was and is contrary to law.

The order of the court overruling all of the several grounds of the motion for new trial as amended illegally terminated said case.

Designation of Record

The defendant, James Avery, specifies as material to a clear understanding of the errors complained of in this

bill of exceptions the following portion of the record, to wit:

1. The bill of indictment in the case of the State versus James Avery, the same being numbered 4169 to the February Term, 1951, of Walker Superior Court, together with each and all of the entries thereon, and transmitted by order to the Clerk of the Superior Court of Fulton County, Georgia.

2. The plea of not guilty of the defendant, James Avery, entered on said indictment.

3. The challenge to the array of grand jurors filed in the Superior Court of Walker County, Georgia, on the 19th day of February, 1951, and transmitted by order to the Clerk of the Superior Court, Fulton County, Georgia.

[fol. 53] 4. The brief of evidence offered in support of the challenge to the array of grand jurors duly certified, approved, allowed, and ordered filed by the Honorable Freeman C. McClure, Judge, Superior Court, Walker County, Georgia, and filed on May 22, 1951, in the office of the Clerk of the Superior Court of Walker County, Georgia, and transmitted by the order changing the venue to the Clerk of the Superior Court of Fulton County, Georgia.

5. The order of the Honorable Freeman C. McClure, Judge, Superior Court of Walker County, Georgia, dated February 19, 1951, overruling said challenge to the array of grand jurors in Walker Superior Court and transmitted by order to the Clerk of the Superior Court of Fulton County, Georgia.

6. Bill of Exceptions pendente lite filed in the Superior Court of Walker County, Georgia, to the order of the Judge of the Superior Court of Walker County, Georgia, overruling said challenge to the array of grand jurors, and filed on the 21st day of February, 1951, and transmitted by order to the Clerk of the Superior Court of Fulton County, Georgia.

7. Order of Honorable Freeman C. McClure, Judge of the Superior Court of Walker County, Georgia, dated May 22, 1951, granting a change of venue and transferring said cause and the entire record therein to the Superior Court of Fulton County, Georgia.

8. Challenge to the array of traverse jurors filed in the Superior Court of Fulton County, Georgia, on September 17, 1951.

9. Amended challenge to the array of traverse jurors as filed on the 17th day of September, 1951.

10. The State's demurrer to and motion to strike the challenge to the array of traverse jurors, filed in the Superior Court of Fulton County, Georgia, on September 17, 1951.

11. The State's traverse to the challenge to the array of traverse jurors filed in the Superior Court of Fulton [fol. 54] County, Georgia, on September 17, 1951.

12. Order of the Honorable Claude D. Shaw, Judge of the Superior Court, Atlanta Judicial Circuit, sustaining said demurrer and motion to strike, in part, to said challenge to the array of traverse jurors, dated September 18, 1951.

13. Order of Honorable Claude D. Shaw, Judge, overruling and denying said challenge to the array of traverse jurors, filed September 18, 1951.

14. Bill of exceptions pendente lite to:

(a) The order of Honorable Claude D. Shaw, Judge, sustaining the demurrer and motion to strike, in part, to said challenge to the array of traverse jurors; and,

(b) The order overruling and denying the prayers of said challenge to the array of traverse jurors, filed September 18, 1951.

15. Brief of evidence introduced in the Superior Court of Fulton County, Georgia, in support of the challenge to the array of traverse jurors (which brief of evidence is included in the main brief of evidence introduced in the trial of said case), duly approved, allowed, and ordered filed by the Honorable Claude D. Shaw, Judge, and filed on the 11th day of January, 1952.

15-A. The charge of the court to the jury.

16. The verdict of the jury, dated September 20, 1951, finding defendant, James Avery, guilty of the crime charged.

17. Sentence of the Court dated September 20, 1951, sentencing defendant, James Avery, to death by electrocution.

18. Original motion for new trial filed in the office of the Clerk of the Superior Court of Fulton County, Georgia, on September 20, 1951, together with all orders, entries, and acknowledgment of service thereon.

19. Amendment to said original motion for new trial duly approved and allowed by the Court and ordered filed, and [fol. 55] filed in the Superior Court of Fulton County, Georgia, on the 11th day of January, 1952.

20. Brief of evidence introduced in the Superior Court of Fulton County, Georgia, in the trial of the case (which brief of evidence has included therein that evidence offered in support of the challenge to the array of traverse jurors), all duly approved, certified to as true, and allowed and ordered filed in the Superior Court of Fulton County, Georgia, on January 11, 1952, together with the order of the judge thereon, allowing and approving same.

21. Order and judgment of the court dated January 11, 1952, overruling and denying said motion for new trial as amended.

22. A certified copy of the affidavit (pauper affidavit) filed by the said James Avery at the time of the filing of this bill of exceptions.

23. The entries of filing of each and all part of the record above specified to be entered and transmitted in proper order.

And now, within the time provided by law, comes the defendant, James Avery, and assigning error on all of the rulings complained of herein as being contrary to law, tenders this his bill of exceptions, and names himself as plaintiff in error herein, and names the State of Georgia as the defendant in error herein, and prays that the same may be certified to as provided by law and transmitted to the Supreme Court of the State of Georgia, that the errors alleged to have been committed may be considered and corrected.

Plaintiff in error alleges that this is a capital case and that jurisdiction of this writ of error is in the Supreme Court, under the provisions of Paragraph IV, Article VI, Section II (Code § 2-3704) of the Constitution of the State of Georgia.

Frank M. Gleason, of Counsel for Plaintiff in Error.
[fol. 56] Geo. P. Shaw, of Counsel for Plaintiff in Error.

Gleason & Painter, Attorneys at Law, Rossville, Georgia; Shaw & Shaw, Attorneys at Law, LaFayette, Georgia.

GEORGIA,
Chattooga County:

The State of Georgia, defendant in error, in the within and foregoing bill of exceptions, hereby approves the recital of fact contained therein as being true and correct.

This 23rd day of January, 1952.

Eugene Cook, Attorney General of the State of Georgia, Atlanta, Ga.

John W. Davis, Solicitor-General, Lookout Judicial Circuit; Paul Webb, Solicitor-General, Atlanta Judicial Circuit; Carl Copeland, Assistant Solicitor General, Atlanta Judicial Circuit; Robert E. Coker, of Counsel for the State of Georgia.

CERTIFICATE OF THE JUDGE

GEORGIA,
Fulton County:

I do certify that the foregoing bill of exceptions is true, and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of Fulton County, Georgia, is hereby ordered to make out a complete [fol. 57] copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court of the State of Georgia that the errors alleged to have been committed may be considered and corrected.

This 23 day of January, 1952.

Claude D. Shaw, Judge of the Superior Court, Atlanta Judicial Circuit.

Acknowledgment of Service—(omitted in printing).

[fols. 58-59] [File endorsement omitted.]

[fol. 60] IN SUPREME COURT OF GEORGIA

No. 17810

AVERY

v.

THE STATE

By the Court: No error assigned requires a reversal of the judgments complained of.

OPINION—Decided April 14, 1952

James Avery was arrested on October 29, 1950, for the offense of rape in Walker County, and was committed to jail. At the February, 1951, term of Walker Superior Court he was informed by the solicitor-general of the judicial circuit in which Walker County is located that an indictment charging him with rape would be presented for grand-jury action during that term of the court. Prior to indictment, he filed a written challenge to the array of grand jurors, alleging that the grand jury had not been legally organized. His challenge was based on the grounds that Code § 59-106, which requires the jury commissioners to select jurors from the books of the tax receiver, offends stated provisions of the State and Federal Constitutions; that no negro has ever been appointed to membership on the board of jury commissioners of Walker County, but Negroes, because of race and color, have been systematically excluded from service thereon; and that no proper jury lists and jury book have been made up and kept for inspection as required by Code § 59-109. Concerning this it was stipulated: The accused is a Negro man; his alleged victim is a white woman. No Negro has ever been appointed to membership on the board of jury commissioners for Walker County. According to the Federal census for 1950, Walker County has a population of 38,265. The tax digest shows that Walker County, in 1950, had 9364 registered white property owners and 464 registered colored property owners. The jury commissioners revised the lists of grand and traverse jurors for Walker County [fol. 61] in 1950, selecting for such service only those men

whose names appeared on the 1950 tax digest for the county. At the hearing of the challenge an alphabetical list of names, certified by the clerk of the superior court and the six jury commissioners for Walker County as being a correct list of the names of those selected for grand and traverse jury services at the board's meeting, which convened on August 14, 1950, was tendered by the accused and allowed in evidence. Another alphabetical list, by militia districts, and headed "Grand and Traverse Jurors, 1950," but not signed by anyone was also tendered by the accused and allowed in evidence. The letter "G" appears opposite the respective name of several jurors appearing on the latter lists, and the following certificate, dated May 22, 1951, is attached thereto: "Georgia, Walker County. I, Thos. W. Bryan, Clerk Superior Court in and for said County do hereby certify that the foregoing is a true and correct copy of the original Grand and Traverse list, by districts, now remaining on file in this office." No evidence explanatory of the letter "G" was offered by either party, but it was stipulated that the two jury lists introduced by the accused "have been on hand in the Clerk's office ever since October 29, 1950, which is the date of the alleged crime, that they have been available for public inspection, and that at all times there has been a person present at all usual office hours who could and would explain those lists to any person that might be interested as to which were members of the grand jury and which were members of the traverse jury box." No contention was made that the challenged grand jurors were not regularly drawn from the grand-jury box. The objection to the grand jury was denied, and the accused excepted pendente lite.

The accused was indicted for rape. He moved for a change of venue which was subsequently granted and his case was transferred to Fulton County for trial. Upon being arraigned for trial in Fulton County, he filed a written [fol. 62] challenge to the array of traverse jurors put upon him, alleging: in the first six paragraphs of his challenge, that the trial jurors furnished him had been illegally selected and impaneled, because Code § 59-106, which requires the jury commissioners to select jurors from the books of the tax receiver, offends stated provisions of the

State and Federal Constitutions; and, in the remaining paragraphs, because the selection of 20,509 white jurors and 1115 colored jurors from a total number of 105,035 white and 17,736 colored taxpayers is an excessively small number of jurors actually selected for service, and the number of colored jurors when compared with the number of white jurors actually selected is excessively disproportionate and the result of a deliberate and systematic exclusion of a required proportionate number of the Negro race for jury service; that, in making up the jury-box, the jury commissioners have placed the names of white and colored jurors on slips of paper of different colors, the names of the white jurors being placed therein on white slips and the names of the colored jurors being placed therein on yellow slips; that the jury commissioners have not supplied the Clerk of the Superior Court of Fulton County with a proper list of those traverse jurors selected for service as required by Code § 59-109; and that no legal and proper list of traverse jurors has been kept on file in the office of the Clerk of the Superior Court of Fulton County as required by law, and by reason of such failure the accused has been deprived of his right to examine the same and ascertain if the jurors put upon him have been legally selected.

A general demurrer interposed by the State was sustained to the first six paragraphs of the challenge and was overruled to the remaining grounds thereof. The accused excepted pendente lite to that part of the judgment which was averse to him. Concerning this challenge, it was stipulated that Fulton County, 1950, had a population of 671,797, [fol. 63] of which 505,983 were white and 165,814 were colored people, and that tax returns were made in 1950 by 105,035 white and 17,736 colored taxpayers. On the hearing of his challenge the accused introduced three witnesses, who testified in brief as follows: The jury commissioners for Fulton County select all grand and traverse jurors exclusively from the books of the tax-receiver—his tax digest, but no one is selected or rejected for jury service because of race or color. The present jury lists for Fulton County were completed on July 25, 1949. They were made by the jury commissioners from the tax returns of white and colored people for 1948. In its last revision of the jury lists

the board of jury commissioners employed the following procedure: Employees of the board made a card for each separate taxpayer of the county from a bound volume of individual tax returns. From these cards the jury commissioners selected those best qualified for jury duty, making a list of the same as selections were made. The list was then turned over to a printer who made copies of it, after the jury commissioners had checked his proof copy against the original list. From the printer's copies tickets were made and placed in the jury boxes by the jury commissioners and one printed copy was retained intact and placed in a binder, upon the cover sheet of which was attached a certificate by the jury commissioners and the Clerk of the Superior Court of Fulton County, certifying that it contained the names of those selected for jury service by the jury commissioners. In keeping with a practice, which has been carried on in Fulton County for fifty years or more, the names of white jurors are placed in the jury boxes on white slips and the names of colored jurors are placed in the jury boxes on yellow slips. This is done for the purpose of aiding the sheriff in locating and summoning individual jurors. The challenged jurors were regularly drawn from the traverse-jury box by one of the Judges of the Superior Court of Fulton County, without regard to race or color and both white and colored traverse [fol. 64] jurors were drawn. It is a common occurrence for both white and colored jurors to serve. Five colored grand jurors served at the July-August, 1951, term of the court. An entire panel or more of colored traverse jurors sometimes serves. A method adopted and practiced by the Judges of the Superior Court of Fulton County in drawing juries prevents any discrimination in jury service as between the white and the colored jurors.

The objection to the trial jurors was overruled, and the accused excepted pendente lite. The case resulted in a verdict of guilty, without recommendation, and the accused was sentenced to be electrocuted. His motion for a new trial, which was amended by adding several special grounds, was overruled. The accused excepted and sued out a writ of error to this court, assigning error upon the judgment overruling his amended motion for new trial and upon his pendente lite exceptions.

CANDLER, Justice. (After stating the foregoing facts.)

1. We will first consider and dispose of the questions raised by the defendant's challenge to the array of grand jurors in Walker County.

(a) The Constitution of this State by article 6, section 16, paragraph 2 declares that "The General Assembly shall provide by law for the selection of the most experienced, intelligent, and upright men to serve as grand jurors, and intelligent and upright men to serve as traverse jurors. Nevertheless, the grand jurors shall be competent to serve as traverse jurors. The General Assembly shall have the power to require jury service of women also, under such [fol. 65] regulations as the General Assembly may prescribe." Except as to the above last-quoted sentence, the Constitution of 1877 required and provided for the same. As its compliance with this constitutional mandate, the General Assembly has provided for the selection of grand and traverse jurors by a board of six jury commissioners in each county. Code, § 59-101. These jury commissioners are required to revise the jury lists biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter. They must select from the books of the tax receiver upright and intelligent men to serve as jurors, and from these they are required to select a sufficient number, not exceeding two-fifths of the whole number, "of the most experienced, intelligent, and upright men to serve as grand jurors." The entire number as first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county. Code, § 59-106. The Constitution does not require that all upright and intelligent men shall be selected as jurors. It merely fixes the qualification of a juror, and leaves to the General Assembly the question as to whether all such persons or a lesser number shall be selected. The law passed by the General Assembly for the purpose of carrying into effect the constitutional provision respecting the selection of jurors does not require that all persons possessing the constitutional qualification shall be selected. It reposes in the jury commissioners not only the authority to determine what men have these qualifications, but how many of such men shall be selected for

jury duty in the county. Our constitutional demand is for a jury list composed of upright and intelligent men—not that every upright and intelligent man be included in the list—and from this list grand jurors must be selected. Accordingly, it cannot be held that Code § 59-106, which provides for the selection of grand and traverse jurors exclusively from the books of the tax receiver—his tax di- [fol. 66] gest—is violative of our Constitution because it does not also permit the board of jury commissioners to select grand and traverse jurors from among those men who make no tax returns. See, in this connection, Wilson v. State, 69 Ga. 224; Rawlins v. State, 124 Ga. 31 (52 S. E. 1); Davis v. Arthur, 139 Ga. 74 (76 S. E. 676), affirmed in 201 U. S. 638 (26 Supp. Ct. 560, 50 L. ed. 899, 5 Ann. Cas. 783); Cady v. State, 198 Ga. 99 (31 S. E. 2d, 38). Our statute, embodied in § 59-106 of the Code, does not, for the reason assigned, violate section 1 of the Fourteenth Amendment to the Constitution of the United States. Strauder v. West Virginia, 100 U. S. 303 (25 L. ed. 664). In Strauder's case the court said: "We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th amendment was ever intended to prohibit this." It is not contended in this case that the challenged grand jurors did not themselves possess the required constitutional qualifications.

(b) The Code (Ann.), § 59-101, provides: "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. . . . The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners." While conceding the constitutionality of this section of the Code, it is alleged and argued by the defendant that it has been unconstitutionally applied in

the selection of the challenged grand jurors, since no Negro [fol. 67] has ever been appointed to membership on the Walker County board of jury commissioners, but Negroes have been systematically excluded therefrom because of race and color. There is no merit in this. Otherwise, the Supreme Court of the United States would, for the same reason, be disqualified to review the defendant's case should it ever reach that court.

(c) There is no merit in the contention that the challenged grand jurors were incompetent to serve as such because the clerk of the superior court failed to prepare and certify a proper jury list or the jury book which the statute requires him to make out and keep in his office. These grand jurors, presumptively, were drawn regularly from the grand-jury box. There is nothing in the record indicating anything to the contrary; and it is well settled in this State that jurors, legally selected and regularly drawn from the jury box, are not rendered incompetent to serve because of any irregularity in the preparation of jury lists or the keeping of a jury book. Carter v. State, 56 Ga. 463; Crawford v. State, 81 Ga. 708 (8 S. E. 445); Washington v. State, 122 Ga. 735 (50 S. E. 920).

2. In his challenge to the array of traverse jurors in Fulton County the defendant made the same attack upon the constitutionality of Code §59-106, the same charge respecting an unconstitutional application of Code §59-101, and the same complaint respecting the preparation of jury lists and the keeping of a jury book as were made by him in his challenge to the array of grand jurors in Walker County. Those questions are fully dealt with and disposed of in the preceding division of the opinion adversely to the defendant's present contention, and our rulings upon them need not be repeated; it being sufficient to say that they afford no sufficient ground of objection to the array of traverse jurors put upon the defendant in Fulton County. But, as to the remaining questions raised by the defendant's [fol. 68] challenge to the array of traverse jurors in Fulton County, we hold:

(a) There is no merit in the contention that the traverse jurors put upon the accused were incompetent to serve be-

cause the number of colored men selected for traverse jury service was excessively small, and because, in proportion to the numbers of white and colored taxpayers in Fulton County, the respective numbers of white and colored men selected for traverse-jury service were excessively disproportionate, and so much so as to show an arbitrary and systematic exclusion of upright and intelligent colored taxpayers from jury service because of race and color. Jury service is not a right or a privilege, but is a burden which the state summons certain of its citizens to bear, and upon no basis is apportionment of jury duty required by the Constitution, the law, or any decision which we have been able to find. The record shows that Fulton County in 1950 had a total population of 671,797, of which 505,983 were white and 165,814 were colored people; that tax returns were made in 1950 by 105,035 white and 17,736 colored taxpayers of that county; and that the jury commissioners by their last revision of the jury lists placed the names of 20,509 white and 1,115 colored jurors upon the traverse jury list. From this information, unaided by other facts, we cannot say that the jury commissioners have arbitrarily and systematically excluded upright and intelligent colored men from traverse-jury service because of their race and color, as contended. For a more thorough discussion of this question, see Watkins v. State, 199 Ga. 81 (33 S. E. 2d, 325), and the cases there cited and discussed by Mr. Justice Grice, who prepared the opinion for the court. The ruling here made is not in conflict with Crumb v. State, 205 Ga. 547 (54 S. E. 2d, 639).

"(b) In revising the jury lists or jury boxes, the jury commissioners are required to write the name of each person selected for jury duty on a ticket and "place the tickets [fol. 69] containing the names of grand jurors in a box to be provided at the public expense, which box shall contain compartments marked number 'one and two,' from which grand jurors shall be drawn, and the jury commissioners shall place the tickets containing the names of traverse jurors in a separate box, from which traverse jurors shall be drawn." Code, §§ 59-106, 59-108. And while the statute does not say so, its manifest intention is that the tickets shall be of uniform size and color, so as to make discrimination impossible in the drawing of jurors; and, where not so done, this is prima facie evidence of discrimina-

tion, and, if nothing else appeared, would require a reversal. In this case, however, it is not charged or contended that any discrimination was practiced in drawing the challenged jurors; and the judge who drew them, as a witness for the accused, testified there was in fact none. Therefore, the practice of placing the names of white and colored jurors in the jury box on tickets of different colors did no harm in this instance, and consequently furnished no sufficient objection to the jurors challenged by the accused.

3. The first and second grounds of the amendment to the motion for a new trial complain of the court's failure to grant a mistrial, on motion of the defendant's counsel therefor, because while Mrs. Hollingsworth, the prosecutrix, was testifying she stated: "As to what effect the blows on the head had on me, well, I was not addled and I was not knocked out by the blows. I was just nervous and didn't have any hopes of ever getting back in the house to my children alive." Also: "Prior to this intercourse up there at the toilet I struggled all I could against him and he got the best of me. I screamed and hollered, I began hollering before he got me out of the door. I kept on hollering for a good long while. I said, it is James Avery, as hard as I could. I was nervous and torn up and knew that he had already killed." These statements, as the record shows, were made voluntarily by the witness and not in re- [fol. 70] sponse to any question propounded. That they were highly prejudicial was the ground upon which the defendant moved for a mistrial. The court, as to the first statement, said to the jury: "I am going to rule that out, any hopes that she had in the case, anything she testified to about what she hoped. That does not have any place in the case, gentlemen of the jury, and I instruct you not to consider that at all." And, concerning the second statement, the court gave the following instruction: "Gentlemen of the jury, about three minutes ago the witness stated something about the word 'killed.' It was an incomplete sort of incoherent sentence that she spoke. She never did complete that sentence. Now the court instructs you that you are to obliterate altogether from your mind the word 'killed' or anything that may be connected with that word. That incomplete sentence that she was about to utter or was in the act of uttering has absolutely no place at all in the trial of

this case. Now I want to make that clear that the court has instructed you not to consider at all that incomplete statement which the witness was making." It is true that impressions may be sometimes created because of statements volunteered by a witness, which may be of such kind and character that their prejudicial effect cannot be taken away. The trial judge has the responsibility of seeing that the rights of the defendant as well as the rights of the State are protected, and is given broad discretion; and that discretion will not be interfered with except in cases where it is apparent that the prejudice to the defendant has not been removed. In this case we think that the injury complained of was effectively removed by the court's action; and, accordingly, no abuse of discretion is shown. These two grounds of the motion afford no sufficient cause for a new trial.

4. Special grounds 3, 4, and 5 of the motion allege that the court erred in allowing in evidence, over objection, photographs of the head, face, and knees of the prosecutrix, [fol. 71] which were taken, as the evidence shows, on Tuesday after the alleged offense of rape is charged to have been committed on the Sunday night before; and the oral testimony of two witnesses, which was to the effect that the photographs correctly portrayed the scratched and bruised condition of Mrs. Hollingsworth's body at the time they were made. These photographs and the oral evidence objected to were relevant, material, and clearly admissible. It was proper to allow them. See, in this connection, Franklin v. State, 69 Ga. 36 (1) (47 Am. R. 748); Johnson v. State, 158 Ga. 192 (2) (123 S. E. 120); Weaver v. State, 199 Ga. 267 (3) (34 S. E. 2d, 163). To exclude evidence of this character on the ground that it would inflame the minds of the jury, would prevent the State from establishing facts material to the issue. A relevant and material fact is not subject to an objection that it would inflame the minds of the jury.

5. The sixth special ground of the amended motion for a new trial complains of the court's failure to grant a mistrial, on motion of the defendant's counsel therefor, because during the trial and while Mr. Coker was making an argument to the jury for the State, Mrs. Hollingsworth, the prosecutrix, made an outcry in the courtroom, in the presence and hearing of the jury, which allegedly was improper

and highly prejudicial to the defendant's case. As to this, and so far as it need be stated, the record shows:

"The Court: Let me do this, let the court interpose these facts for the purpose of the record. I did hear an audible sound in the courtroom. Mrs. Hollingsworth, the prosecutrix, was sitting on the first bench, I believe that is correct, outside of the railing of the courtroom, and I heard one audible sudden cry, which in my best judgment probably came from her and that was all that I heard, and I immediately sent the jury out upon Mr. Gleason making a motion or intimating that he wanted to make a motion. The jury was then immediately sent out of the courtroom. Now gentlemen, does that fairly and accurately state the situation?"

[fol. 72] "Mr. Davis (The Solicitor-General): Yes."

"Mr. Gleason: I would like to state in my place, or I will be glad to be sworn if the State wants it that way, as counsel for the defendant serving under appointment by the court, that I was seated in my chair during the argument of Mr. Coker, special prosecuting counsel, to the jury; that Mrs. Hollingsworth was seated on the front seat outside of the bar, which I would estimate to be twenty feet from the end of it, which I would estimate to be seventeen feet from the end of the jury box; that Mr. Coker, while waxing eloquent in an oratorical vein with an argument tending to arouse the feelings of an ordinary human being, including perhaps the judge, the jury, and counsel for the defendant, caused Mrs. Hollingsworth to make an audible outcry that was audible to counsel for the defendant as well as the court. I immediately looked around. I noticed that Mrs. Hollingsworth had her hands over her face. She was crying in an audible manner that I heard, seated next to the lady who now appears on the first row of the bench outside the bar; that I looked at the jury and I saw two members of the jury looking at Mrs. Hollingsworth. I immediately got up and made the motion. I'll be glad to be cross-examined on any matter of that statement."

"The Court: You agree the entire incident occurred in a second or two, I think."

"Mr. Gleason: Yes, I think that is a fair statement."

"Mr. Davis: I would like to say for the purpose of the record, and I will be subject to cross-examination, on hear-

ing a slight outcry in the rear of the courtroom, I looked around and the prosecutrix had her hand to her mouth as she did several instances yesterday. That was my view, it might have been sometime after Mr. Gleason's, I don't know."

"The Court: Gentlemen, it is certainly the intent and desire of this court to see that the defendant has a fair and impartial trial as he is entitled to have under the law; however, the court is of the opinion that this slight outburst is [fol. 73] not calculated to and did not, in the opinion of the court, prejudice any of the rights of the defendant in the case so I am going to overrule the motion for mistrial."

"Mr. Gleason: In that connection now, will Your Honor order the prosecutrix to remain out from the hearing in the presence of the jury so there will not be a reoccurrence? Will Your Honor admonish the jury to utterly disregard that outburst on her part?"

"The Court: Yes, I will follow your recommendations in both of those instances, and I am going to require the prosecutrix to remain out of the courtroom. Mr. Sheriff, I want you to be sure she remains out of the courtroom during the remainder of this trial."

"Mr. Gleason: And Brother Shaw (George Paul Shaw, of counsel for defendant) suggests that I ask Your Honor to add to the admonition that the outcry was improper conduct."

The jury was then returned to the courtroom and instructed as follows:

"The Court: Gentlemen of the jury, a few minutes ago in this courtroom there was a slight outcry made on the part of Mrs. Hollingsworth, the prosecutrix in this case. Now the court instructs you that that conduct was highly improper. The court further instructs you that you are to try this case solely from the evidence and from the sworn testimony which has been introduced in the trial of this case, and the defendant's statement. The court instructs you that you are to completely disregard and erase completely from your minds that incident which I have just referred to. That incident has absolutely no place at all in the trial of this case, and I want to make it perfectly clear to each of you

gentlemen on the jury that you are to completely and entirely erase from your minds and memory that incident. I think that is perfectly clear."

It is undeniably the right of every person accused of crime in this State to have a fair and impartial trial, free from [fol. 74] any demonstration or disorder of a nature calculated to affect prejudicially the jurors trying his case. Patton v. State, 117 Ga. 230, 237 (43 S. E. 533). But in the circumstances of this case we are not prepared to say that the refusal of the trial judge to declare a mistrial was erroneous. See Clements v. State, 123 Ga. 547 (51 S. E. 595); Brown v. State, 148 Ga. 264 (96 S. E. 435). Compare Glenn v. State, 205 Ga. 32 (52 S. E. 2d, 319). Motions of this character are addressed to the discretion of the trial judge; and, unless it can be shown that such discretion has been abused and some positive injury done by the occurrence complained of, the discretion of the trial judge will not be controlled. Inman v. State, 72 Ga. 269; Purvis v. Atlanta Northern Ry. Co., 145 Ga. 517 (89 S. E. 571). We are not authorized by the facts concerning the occurrence complained of to say that the trial judge abused his discretion in denying the defendant's motion for a mistrial. To the contrary, we do not think that he did.

6. Error is assigned because the court refused to declare a mistrial on account of certain language employed by Mr. Coker, of counsel for the State, in his argument to the jury, it being alleged that his argument was not authorized by the evidence, and that it prejudiced the minds of the jury against the defendant. The remark complained of was, "We are not going to have our women beaten and you put a stop to this." The motion to declare a mistrial was denied by the trial judge, who directed offending counsel to confine his remarks to the case on trial, the evidence, and the defendant's statement. The remark, allegedly improper, was not of such a character as to require the granting of a mistrial upon the ground that the court erred in refusing a mistrial at the time the remark was made. See Dickerson v. State, 121 Ga. 436 (48 S. E. 942). Accordingly, there is no merit in special ground 7 of the motion.

7. The court charged as follows: "Gentlemen, if you [fol. 73] believe that a crime was committed as charged in

this bill of indictment, but you do not believe that this defendant committed the crime, if you believe such crime was committed, or if you should have a reasonable doubt as to whether he committed the crime, it would be your duty to give him the benefit of the doubt and acquit. In other words, gentlemen, before you could convict this defendant, you must first believe that a crime was committed as charged in the bill of indictment, and you must also believe beyond a reasonable doubt that this defendant is the person who committed that crime. If you have a reasonable doubt as to the defendant's guilt, it is your duty to give him the benefit of that doubt and acquit him." Special ground 8 complains of the court's failure to also give, on written request, the following instruction: "I charge you that on a trial for rape the identification of the accused as the person who committed the offense is of paramount importance and must be established beyond a reasonable doubt." This ground of the motion is without merit. The court is not required to give a requested charge when, as here, it is argumentative in character. Taylor v. Taylor, 195 Ga. 711 (8) (25 S. E. 2d, 506).

8. Error is assigned, in special ground 9 of the amended motion for new trial, on the court's failure to give the following timely requested charge: "I charge you that the credit to be given the testimony of the prosecutrix depends, more or less, on the concurrence of circumstances with her testimony; for instance, if she be of good fame, if she presently discovered the offense, made pursuit after the offender, and showed circumstances and signs of the injury. But if she concealed the injury for any considerable length of time after she had opportunity to complain, if the place where the fact was supposed to be committed was near inhabitants or places of common recourse or passage, and she made no outcry when the fact was supposed to be done, where it is probable that she might have been heard by [fol. 76] others, these and other like circumstances carry a strong presumption that her testimony is false or feigned." In the circumstances of this case, failure to give the requested charge was not error. A request to charge should not be given, though abstractly correct, when not properly adjusted to the facts of the case. Brannon v. State, 140 Ga.

787 (80 S. E. 7); Holton v. State, 137 Ga. 86 (4) (72 S. E. 949); Rouse v. State, 136 Ga. 356 (71 S. E. 667). In this case the defendant offered no evidence, but by his statement sought to set up the defense of alibi. There was no evidence showing or tending to show that the prosecutrix was a woman of bad character, or that she failed to presently discover the offense and pursue her assailant. To the contrary, it appears in substance from the State's evidence: that the accused, at night and while intoxicated, went to the home of the prosecutrix where she and several small children were alone; that he broke open a door, seized the prosecutrix, pulled her out in the yard some short distance from the house, and had intercourse with her forcibly and against her will; that she screamed and hollered at the time of the assault until she was "unable to utter a word;" that her fourteen-year-old son, who was not at home when the accused entered, and a negro man came up while the accused had her on the ground; that the accused then jumped up and ran; that she at that time told her son about the occurrence; that the affair was immediately reported to the officers; that she was carried to a hospital for treatment, her body being badly scratched and bruised; that the accused was arrested during that night, shortly after the assault, and on being brought before her at the place to which she had been carried for treatment was positively identified by her as her assailant. See Teague v. State, 208 Ga. 459 (67 S. E. 2d, 467).

9. The remaining special ground of the motion for new trial alleges that the court erred in failing to charge, without request, upon the defendant's defense of mistaken identity. As to this, the charge as given was sufficient in the absence [fol. 77] of a written request for more specific instructions on the subject. Accordingly, there is no merit in this ground.

10. The verdict is amply supported by evidence, and no reason appears for interfering with the discretion of the trial judge in refusing a new trial.

Judgment affirmed. All the Justices concur, except Atkinson, P. J., and Wyatt, J., who dissent. Head, J., concurs specially.

Head, J., concurring specially. There is neither constitutional nor statutory authority for the use of different colors of paper in placing the names of colored jurors in the jury

box. This practice could serve only one purpose, to wit, discrimination in the drawing of the names of colored jurors from the box. Prima facie such practice is wrong and should be discontinued at the first opportunity to revise the jury list. The testimony of Judge Moore as to the method in which the jurors are drawn is sufficient to show that the defendant was not harmed in this case, since there was no discrimination against colored jurors in the selection of the traverse jurors.

Wyatt, Justice, dissenting. I cannot agree with the ruling in subdivision (b) of division 2, for the reason, in my opinion, that this practice is conclusive evidence of discrimination, and for that reason the case should be reversed.

I am authorized to say that Presiding Justice Atkinson joins me in this dissent.

[fol. 78] In Supreme Court of Georgia

Atlanta.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

James Avery

v.

The State

Judgment—April 14, 1952

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur, except Atkinson, P. J., and Wyatt, J., who dissent. Head, J., concurs specially.

[fols. 79-94] Clerk's Note

Petition for rehearing to Supreme Court of Georgia, filed on the 23rd day of April, 1952 and denied on the 14th day of May, 1952, together with the order of Supreme Court of Georgia denying the same, without opinion. (Omitted in printing.)

[fol. 95] IN THE SUPREME COURT OF GEORGIA

[Title omitted]

PETITION TO STAY THE ENFORCEMENT OF THE JUDGMENT OF THE SUPREME COURT OF GEORGIA IN THE ABOVE STATED CASE—Filed May 15, 1952

To The Honorable W. H. Duckworth, the Chief Justice of the Supreme Court of Georgia:

Now comes James Avery, the plaintiff in error in the above-stated case and files this his petition to stay the judgment of the Supreme Court of Georgia and withhold the issuance of a remittitur to the Superior Court of Fulton County, Georgia, and for grounds thereof alleges:

1

That the plaintiff in error will, within the time provided by law, to wit: Ninety days from the date of the denial of the motion for rehearing (Rule 38½ of the Rules of the Supreme Court of the United States and 28 U. S. C. A., Section 2101(c)), file his petition for writ of certiorari in the Supreme Court of the United States.

2

That the Supreme Court of the United States has jurisdiction to act on such petition when filed by virtue of Title 28, Section 1257, U. S. C. A. and Title 28, Section 2101, U. S. C. A., because Constitutional questions are involved in the case.

3

That a stay of the Enforcement of the sentence and the issuance of a remittitur to the Superior Court of Fulton County may be granted by a Judge of the Supreme Court of Georgia under the provision of Title 28, Section 2101 (f) U. S. C. A.

[fol. 96] 4

That important and heretofore undecided questions are involved in said case. Two Justices of this Court stating

the case should be reversed, with one Justice concurring specially.

5

This application is made in good faith and not for delay.

Frank M. Gleason, of Counsel for Plaintiff in Error.

Gleason & Painter, Attorneys at Law, Rossville, Georgia; Shaw & Shaw, Attorneys at Law; LaFayette, Georgia.

GEORGIA,
Walker County:

Frank M. Gleason, being first duly sworn on oath says that he is of counsel for James Avery, the plaintiff in error, having been appointed as such by the Judge of the Superior Court of Walker County, Georgia; that he verily believes that important and heretofore undecided questions are involved in said case and that a question of sufficient importance is made on constitutional grounds which will justify the filing of an application for certiorari in the Supreme Court of the United States.

Affiant further declares that he and George P. Shaw have served in said case without the payment of any sum whatsoever as attorneys fees solely by virtue of their appointment by the Court as aforesaid.

This 14 day of May, 1952.

Frank M. Gleason, of Counsel for Plaintiff in Error.

Subscribed and sworn to before me this 14 day of May, 1952. Dorothy Seagle, Notary Public. (Seal.)

[fol. 97] Certificate of Service—(omitted in printing).

[fol. 98] IN SUPREME COURT OF THE STATE OF GEORGIA

[Title omitted]

ORDER GRANTING STAY—Filed May 15, 1952

Upon consideration of the foregoing petition, it is hereby granted. The Clerk of this Court is directed to withhold the remittitur in this case for a period of ninety (90) days from May 14, 1952, the date of the denial by this Court of

the motion for a rehearing herein, in order to allow counsel for the petition to prepare and file a petition for the writ of certiorari in the Supreme Court of the United States.

This May 15, 1952.

W. H. Duckworth, Chief Justice, Supreme Court of Georgia.

[fol. 99] IN SUPREME COURT OF GEORGIA

LETTER RE SPECIFICATIONS FOR PRINTING OF RECORD

Frank Milton Gleason, Paul Wain Painter, Andrew W. Cain, Jr., William B. Woods.

GLEASON & PAINTER,
Attorneys at Law
102 Howard Street
Rossville, Georgia.

June 16, 1952.

Miss Katharine C. Bleckley, Clerk, Supreme Court of Georgia, State Capitol, Atlanta, Georgia; Attn: Mr. Henry H. Cobb, Deputy Clerk.

In Re: Case No. 17810

JAMES AVERY

v.

STATE.

Dear HENRY:

Thank you for your letter of June 14th and for the suggestions there made.

I would like the material arranged in the following order:

1. The Indictment and Plea of Not Guilty.

2. The Challenge to the Array of Traverse Jurors filed in the Superior Court of Fulton County, Georgia on September 17, 1951.

3. The Amended Challenge to the Array of Traverse Jurors filed in the Superior Court of Fulton County, Georgia, on September 17, 1951.

4. The State's Demurrer to this Challenge to the Array.
5. The State's Traverse to this Challenge to the Array.
6. The Order of the Judge of the Superior Court, Atlanta, Georgia, sustaining the Demurrer and Motion to Strike.
7. Transcription of the Testimony of George A. Campbell and Mr. J. W. Simmons; the Certificate of the Jury Commissioners contained in the transcript and the Testimony of Judge Moore.
8. The Order of Judge Shaw overruling and denying the Challenge to the Array.
[fol. 100] 9. The Bill of Exceptions Pendente Lite to the Orders sustaining the Demurrer and overruling and denying the Challenge to the Array.
10. Bill of Exceptions.
11. The Opinion of the Court.
12. Judgment (Remittitur).
13. Motion for Rehearing.
14. Order denying Motion.
15. Petition to Stay Transmission of Mandate (Remittitur) to Fulton Superior Court.
16. Order Granting Stay.
17. Specification of Record.

In my letter to you of May 23rd, I overlooked the Indictment, the Order Denying Motion for Rehearing, the Remittitur, Specifications and the Petition to Stay the Transmission of the Remittitur to the Superior Court of Fulton County, Georgia, and Order Granting the Stay.

These additional parts of the record are comparatively short and I am sure you will have no difficulty with the same.

You may consider the above letter as supplementary to my letter of May 23rd.

I do not think it necessary to file a formal specification, because, after all, the foregoing specifies sufficiently what we want in the record.

Thanking you very much for your kindness in calling this to my attention.

With kindest personal regards,

Yours very truly, Frank M. Gleason.

FMG:bhb

[fol. 101] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 102 Misc

JAMES AVERY, Petitioner,

vs.

THE STATE OF GEORGIA

ORDER GRANTING CERTIORARI—March 9, 1953

On petition for Writ of Certiorari to the Supreme Court of the State of Georgia

On consideration of the motion for leave to proceed herein in *forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 648 and placed on the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.